IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROJEL PEREZ-MEJIA, FREDDIE DOMINQUEZ, Defendants, and JOEL SOTO-RODRIGUEZ, and each of them, Appellant.	)	No. 54544-2-I DIVISION ONE PUBLISHED IN PART FILED: September 18, 2006

DWYER, J. — On a White Center street, Margaret Emmitt saw violence unfolding and tried to intervene as a peacemaker. Witnesses to the confrontation, including two of its participants, described an escalating argument between two opposing groups, each comprised of two men, who were heatedly exchanging insults, belligerent gestures, and references to their respective gang affiliations before Ms. Emmitt interceded. Unfortunately, the men did not heed her appeal for calm. One of the men produced a pistol and repeatedly fired towards his adversaries, senselessly killing Ms. Emmitt instead.

Both the shooter, Rojel Perez-Mejia, and his cohort Freddie Dominguez

pleaded guilty to second degree murder for their roles in Ms. Emmitt's death, and are serving sentences of imprisonment.

Joel Soto-Rodriguez, an acquaintance of Perez-Mejia and Dominguez whose role in the shooting, if any, is less clear, was charged with first degree murder with a firearm enhancement arising from the killing. This appeal is taken from the judgment entered on the jury's verdict finding Soto-Rodriguez guilty as charged.

After a careful review of the trial record and the appellate arguments of counsel, we arrive at the inescapable conclusion that Soto-Rodriguez's trial was marred by the prosecutor's inflammatory closing argument. The inappropriate argument was so egregious as to constitute prosecutorial misconduct, the appeals to passion and prejudice therein having compromised the fairness of the trial. As a result, Soto-Rodriguez's conviction must be reversed and the case remanded for a new trial.[1]

FACTS

Shortly after 2 a.m. on May 4, 2003, Ivan DeJesus and Juan Viellmas were standing on the sidewalk in front of a White Center dance club, awaiting

[1] In the unpublished portion of this opinion, we also conclude that sufficient evidence on each element of the charged offense was introduced at trial in support of the jury's verdict. Thus, Soto-Rodriguez is not entitled to the remedy of dismissal of the charge against him.

In addition, we determine that the trial court properly ruled that Soto-Rodriguez's statement to police officers was voluntarily made and that testimony concerning his remarks was properly admitted at trial.

Several other alleged trial irregularities do not merit appellate relief. We address these issues to note our evaluation of the claims, although we have no reason to anticipate similar difficulties upon remand.

their companions who were inside the club. Rojel Perez-Mejia and Freddie Dominguez approached DeJesus and Viellmas from the other side of the street, made gang-related hand signals, stated that they belonged to the gang Mara Salvatrucha (MS), and insulted a rival gang, the Vatos Locos (VL).[2] In response, Viellmas insulted the MS. DeJesus and Viellmas challenged Perez-Mejia and Dominguez to a fight.

Ms. Emmitt placed herself between the two groups to try to stop the fight. Perez-Mejia, who wore a leather glove on his right hand, pulled a pistol from his waistband with that hand and fired several shots. Ms. Emmitt was hit by two bullets from the pistol. Medics later transported Ms. Emmitt to Harborview Hospital, where she died from her injuries.

Shortly after the shooting, an eyewitness telephoned the police to report that Dominguez was in a gas station approximately one block from the scene of the shooting. Dominguez was detained by King County Deputy Sheriff Jason Milne, and was subsequently placed under arrest.

On May 15, 2003, Detective Gies and Deputy Vowell, both from the King County Sheriff's Office, interviewed Soto-Rodriguez, who was in custody on an unrelated matter, after advising him of his Miranda[3] rights.

During the interrogation, Soto-Rodriguez stated that, on the night of Ms. Emmitt's murder, he (1) drove to the dance club with Perez-Mejia and

[2] Other testimony was that "VL" stood for "Varrios Locos."
[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Dominguez; (2) observed a confrontation between Perez-Mejia, Dominguez, and two other men; (3) had a beer bottle in his hand at the time of the confrontation, which he set on the curb after the shooting; (4) saw a woman get between the four men; (5) heard shots fired; and (6) left the scene.

On June 12, 2003, King County sheriff's deputies arrested Perez-Mejia. He confessed that he had fired the shots that killed Ms. Emmitt. He stated that Dominguez and Soto-Rodriguez had encouraged him to use violence against rival gang members, and that Soto-Rodriguez supplied the gun. In addition, he told the officers that Nelson Andrade-Soriano and Manuel Aguilar-Segovia were present during both the shooting and the events that led up to the shooting. Perez-Mejia stated that he, Dominguez, Soto-Rodriguez, Andrade-Soriano, and Aguilar-Segovia were all members of MS, and that the shooting was part of a dispute between MS and a rival gang.

Perez-Mejia, Dominguez, and Soto-Rodriguez were all charged with first degree murder with a firearm sentence enhancement arising from Ms. Emmitt's death. Perez-Mejia and Dominguez subsequently pleaded guilty to reduced charges of second degree murder.

Soto-Rodriguez was tried by jury in King County Superior Court.

Prosecution Witnesses

At Soto-Rodriguez's trial, eyewitness Julio Betancourt testified that, in the early morning of May 4, 2003, he saw two men on one side of Sixteenth Avenue

Southwest get into an argument with two men on the other side of the street. He saw a woman intervene. Next, he saw one of the men on the east side of the street step back, pull out a gun, and shoot at the other men. He saw the woman fall to the street. Betancourt also saw a fifth man at the scene whose association with both pairs of men was unclear to him. That man was holding a beer bottle, which he placed in his clothing after the shooting.

Eyewitness Heidi Peterson testified that, shortly after 2 a.m. on May 4, 2003, she was driving on Sixteenth Avenue Southwest and thought she had come upon a riot. She observed between twenty and thirty people outside of a nightclub. She saw a man smash a bottle into the window of an oncoming car. She then put her car in reverse and backed away. While so doing, she saw a man fire a pistol toward people in the center of the street. She ducked. When she looked up again, she saw Ms. Emmitt lying in the street.

The shooter's intended targets, DeJesus and Viellmas, also testified. Both men described being outside of the nightclub for approximately one hour before the shooting, and immediately thereafter. Both men described seeing two other men approach them from the opposite side of the street, making gang-related hand signals. Both described challenging the other two men to a fight. DeJesus testified that one of the other men pulled out a gun and started shooting.

DeJesus testified that Soto-Rodriguez walked into the nightclub with two

women less than thirty minutes before the shooting, and that he did not perceive Soto-Rodriguez to be involved in either the shooting or the preceding argument.

Andrade-Soriano also testified. He stated that he was at the nightclub the night of the shooting. He testified that he was confronted by members of the rival "18th Street gang," who told him that a member of MS had hit a member of their gang the week before, and that they intended to kill the MS member who had attacked their associate.[4] Andrade-Soriano testified that he telephoned Dominguez from the club to report this conversation, and then went to Soto-Rodriguez's house, where he met up with Soto-Rodriguez, Dominguez, Perez-Mejia and Aguilar-Segovia.

Andrade-Soriano further testified that he, Dominguez, Soto-Rodriguez, Aguilar-Segovia, and Perez-Mejia got into a car and drove back to the club. Andrade-Soriano testified that Soto-Rodriguez told the men where to stand and when to display gang-related hand signals when they confronted the rival gang members. Upon arrival, all except Aguilar-Segovia, who was driving, exited the car near the club. Andrade-Soriano stated that he waited on the corner, Dominguez and Perez-Mejia walked up one side of the street, and Soto-Rodriguez stayed on the other.

Andrade-Soriano testified that Dominguez and Perez-Mejia then approached two men and made gang-related hand signals, that Soto-Rodriguez

[4] The previous incident between the 18th Street gang and the MS was an assault involving a pool cue that occurred on April 27, 2003.

threw a bottle at a car, and that Perez-Mejia shot Ms. Emmitt.

Aguilar-Segovia also testified. He stated that, in the early morning of May 4, 2003, he drove from Soto-Rodriguez's house to the club, and that Soto-Rodriguez, Dominguez, Perez-Mejia and Andrade-Soriano were in the car. Aguilar-Segovia heard Soto-Rodriguez ask "who is going to do it?" and heard some of the others reply, "I will."[5] Aguilar-Segovia testified that Soto-Rodriguez produced a pistol, that Dominguez and Perez-Mejia both asked for the pistol, and that Soto-Rodriguez passed the pistol to Perez-Mejia. Aguilar-Segovia stated that he dropped the other men off by the club and drove around the corner.

Christina Devitt testified that she was at a party at Soto-Rodriguez's home on that same night, along with her sister Lisa Devitt, Dominguez, Perez-Mejia, Aguilar-Segovia, Soto-Rodriguez, Jessica Rodriguez,[6] and Chelsea Jensen. She testified that when Andrade-Soriano telephoned Dominguez, Dominguez started yelling. After Dominguez hung up the telephone, Devitt saw Soto-Rodriguez, Dominguez, Perez-Mejia and Aguilar-Segovia rush to leave. She also saw "a quick flash" or a "glimpse" of a gun.

Chelsea Jensen testified that she was also at Soto-Rodriguez's home with Jessica Rodriguez, Lisa and Christina Devitt, Dominguez, Perez-Mejia, Aguilar-Segovia, and Soto-Rodriguez on the same night. She testified that at one point

[5] Aguilar-Segovia was unable to discern who in the car responded to Soto-Rodriguez's question.

[6] Jessica Rodriguez is not related to Soto-Rodriguez.

in the evening Dominguez, Perez-Mejia, Aguilar-Segovia, and Soto-Rodriguez left the party. She testified that before the men left, Soto-Rodriguez handed a gun to Perez-Mejia, and that Perez-Mejia had the gun when the men left the house. When Soto-Rodriguez returned to his house, he appeared to be exhausted.

Jessica Rodriguez testified that, on the morning of May 4, 2003, Soto-Rodriguez returned approximately two hours after the men had left.

Defense Witnesses

Soto-Rodriguez testified at trial and also presented the testimony of Amber Dawn Clift, Katia and Brenda Lugo-Olivas, and Elpido Villegas-Trejo.

Clift testified that, on the night of May 3, 2003, she saw Perez-Mejia at a party in Ballard before he departed for Soto-Rodriguez's house in Burien, and that he had a holstered gun in his waistband.

Villegas-Trejo, a friend of DeJesus and Viellmas, testified that he witnessed the shooting and the preceding argument. Villegas-Trejo testified that he saw DeJesus with a bottle in his hand and heard the sound of a bottle striking the window of a car. He did not recognize Soto-Rodriguez and said he had not seen him anywhere near the argument or the shooting.

Katia and Brenda Lugo-Olivas each testified that when they left the nightclub at approximately 2 a.m. on May 4, 2003, they ran into Soto-Rodriguez just outside of the door to the club. While they were conversing, they heard gunshots and fled.

Soto-Rodriguez testified that he went to the nightclub sometime between one and two a.m. on the night of May 4, 2003, to look for some of his friends. He stated that he went into the club, and that, on his way out, he encountered his ex-girlfriend Katia and her sister, Brenda. While they were conversing, they heard gunshots.

Soto-Rodriguez further testified that the next morning Andrade-Soriano came to Soto-Rodriguez's house looking for Dominguez and Perez-Mejia. Andrade-Soriano told Soto-Rodriguez that there had been a problem outside the nightclub the night before, and that Perez-Mejia started a confrontation and shot someone.

DISCUSSION

I. Prosecutorial Misconduct

In closing argument, the prosecutor appealed to the jury's passions and prejudices, urging jurors to base a guilty verdict on a goal of sending a message to gangs or taking part in a mission to end violence, rather than returning a verdict based upon a consideration of the evidence properly admitted in the case. The majority of this improper argument followed a timely objection interposed by Soto-Rodriguez's counsel. The trial court overruled this objection and, thus, no curative instruction was given. We conclude that the prosecutor's improper argument irreparably damaged the fairness of the trial and diminishes our confidence in the verdict reached. As a result, Soto-Rodriguez's

conviction must be reversed, and a new trial held.

Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).[7] Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict. Belgarde, 110 Wn.2d 504. Likewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden. State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995).[8] In closing argument, a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing United States v.

[7] This principle is one of long standing. Almost three decades ago, our Supreme Court explained: "In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason. As we have stated on numerous occasions, the prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds. Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

[8] Federal courts addressing these issues have likewise held that it is improper for a prosecutor to urge the jury "to view this case as a battle in the war against drugs, and the defendants as enemy soldiers," Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993), that the constitution prohibits appeals to racial, ethnic or religious prejudice, United States v. Cabrera, 222 F.3d 590, 594 (9th Cir. 2000), and that it is improper for a prosecutor to "direct the jurors' desires to end a social problem toward convicting a particular defendant." United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991) (reversing based on prosecutor's call to send a message to drug dealers, notwithstanding curative instruction given by trial court).

Garza, 608 F.2d 659, 663 (5th Cir. 1979)).

A defendant alleging improper argument on the part of the prosecutor must establish both the impropriety and the prejudicial effect of the argument. Russell, 125 Wn.2d at 85. To be entitled to relief, the defendant must demonstrate a substantial likelihood that the misconduct affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The allegedly improper arguments must be reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. Russell, 125 Wn.2d at 85-86.

A. The total argument

In this case, the argument, considered in totality, was inflammatory. In closing, the prosecutor stated:

> [We can] pick up the torch that Ms. Emmitt had been carrying…. We can continue her mission to try to stop this violence that has occurred.
>
> Now, although you as ladies and gentlemen of the jury will not be placed in harm's way, you will not physically be in the middle of a war as Ms. Emmitt was, you will not have someone behind you pointing a loaded gun at your back as Ms. Emmitt was. But what you can do as ladies and gentlemen of the jury is send a message.

At this point, Soto-Rodriguez's counsel interrupted the argument, stating, "Objection to call for messages."[9] The trial court overruled the objection.

[9] Failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, 116 Wn.2d at 93. Because Soto-Rodriguez's counsel properly objected to the inappropriate argument, this greater standard of prejudice does not apply to his claim of error on appeal.

The prosecutor continued:

> Send a message to Scorpion,[10] to other members of his gang … and to all the other people who choose to dwell in the underworld of gangs. That message is we had enough. We will not tolerate it any longer. That we as citizens of the State of Washington and the United States of America, we have the right to life, liberty and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.
>
> It begins now by finding that the defendant was involved in the death of Ms. Emmitt. That message can be sent by holding the defendant responsible for his actions, for his involvement in the gang. For him being an accomplice to his other gang members in the death of Ms. Margaret Emmitt.

This argument improperly invoked the jurors' patriotic sentiments and, having done so, cast the defendant as an oppressor of the inalienable rights listed in our nation's Declaration of Independence. These appeals to prejudice and patriotism were unquestionably improper. Neidigh, 78 Wn. App. at 79. This argument needlessly injected the sensitive issues of nationality and ethnicity into a case where the defendant and his associates were alleged members of a Central American gang, many of whom, including Soto-Rodriguez, required Spanish language interpreters during the trial.

Elsewhere in the closing argument, the prosecutor called further unnecessary attention to the defendant's ethnicity. He stated, "[W]hen the gang members were at [Soto-Rodriguez's] house after receiving the call they walked out of the house with their chests sticking out proudly showing their machismo." This statement clearly was designed to call attention to the defendant's ethnicity.

[10] Testimony at trial had described Soto-Rodriguez as having the nickname "Scorpion."

The statement is troubling on its own. In the context of the argument as a whole, it added to the potential for a verdict based on ethnic prejudice or nationalistic concerns. It is unquestionably improper for a prosecutor to reference racial or ethnic prejudice or to appeal to jurors' fear and repudiation of criminal groups as a reason to convict. Belgarde, 110 Wn.2d at 507.

There is a clear danger that the prejudicial impact of the prosecutor's objectionable statements, considered in their totality, affected the jury's verdict.

B. Issues in the case

The issues in the case magnified the prejudicial impact of the misconduct. The primary issue in the case was Soto-Rodriguez's role, if any, in the homicide. There was evidence admitted from which the jury could have reasonably entertained doubts about Soto-Rodriguez's guilt. First, eyewitnesses to the shooting provided varying accounts of the number of people involved in the fight that led up to the shooting. Two of the fight's participants, Viellmas and DeJesus, described the fight as being "two against two," and identified Perez-Mejia and Dominguez as their co-combatants. DeJesus also testified that he saw Soto-Rodriguez entering the nightclub earlier with two women, and did not believe Soto-Rodriguez was involved in the fight or the shooting. Second, there was testimony that Andrade-Soriano, Jensen, and Devitt, witnesses who provided damaging testimony against Soto-Rodriguez, had provided conflicting accounts of the events surrounding the shooting on different occasions,

potentially undermining the jury's confidence in their testimony. Additionally, witnesses Jessica Rodriguez, Clift, Katia and Brenda Lugo Olivas, Villegas-Trejo, and Soto-Rodriguez offered accounts of the events surrounding the shooting that tended to exculpate Soto-Rodriguez. Because the State's case against Soto-Rodriguez was controverted, the prejudicial impact of the misconduct is magnified.

Moreover, although gang-related evidence was central to the State's theory of culpability, this evidence was, by its nature, highly prejudicial. The trial court carefully circumscribed the admissibility of this prejudicial evidence and based its evidentiary rulings on proper considerations of the State's need to present probative evidence balanced against Soto-Rodriguez's right to a trial free from unfair prejudice. Unfortunately, the prosecutor's closing argument put before the jurors several of the most problematic types of prejudice that the law essays to exclude from juror consideration, including nationality, ethnicity, patriotism, and fear of crime, and invited a verdict based on passion or prejudice, rather than on proper evidence. This misconduct upset the balance struck by the trial court's principled evidentiary rulings. Accordingly, in view of the issues in the case, the misconduct likely affected the jury's verdict.

C. Instructions given by the trial court

The trial court gave no curative instruction following Soto-Rodriguez's objection. Instead, it overruled the objection.

The trial court, at best, failed to cure the prejudicial impact of the improper argument. At worst, the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's ruling lent aura of legitimacy to prosecutor's misconduct). This increases the likelihood that the misconduct affected the jury's verdict.

D. Evidence addressed in argument

The evidence addressed in the argument also highlights the prejudicial impact of the misconduct.

Although much of the prosecutor's closing argument was properly based on the evidence, the case against Soto-Rodriguez was comprised of prejudicial, yet properly admissible, evidence of a gang dispute that resulted in the death of an innocent. The misconduct at issue encouraged the jury to base its verdict on the powerful emotions, concerns or prejudices that arise from the facts of the case, rather than on the facts themselves.

The evidence addressed by the improper argument increases the likelihood that it affected the jury's verdict.

We conclude that the argument was improper. We also conclude that there exists a substantial likelihood that the prosecutor's remarks affected the jury's verdict and, thus, Soto-Rodriguez has established the prejudicial impact of the improper argument. We also conclude that this error was of constitutional

magnitude and that it was not harmless.[11]

Soto-Rodriguez did not receive a fair trial. Accordingly, we must reverse Soto-Rodriguez's conviction and remand the matter for a new trial.

The remainder of this opinion has no precedential value. Therefore it will be filed for public record in accordance with the rules governing unpublished opinions.

II. Sufficiency of the evidence

Soto-Rodriguez also challenges the sufficiency of the evidence adduced at his trial to support his conviction. Specifically, he asserts that there was insufficient evidence to prove premeditation. This challenge is unavailing. Sufficient evidence on each element of the charged offense was introduced to support the jury's verdict. Thus, Soto-Rodriguez is not entitled to the remedy of dismissal.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found all of the elements of the crime proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Soto-Rodriguez was charged as an accomplice[12] to first degree murder

[11] Before we hold a constitutional error to be harmless, we must find it harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Charlton, 90 Wn.2d at 664.

[12] A person is an accomplice of another person in the commission of a crime if: "(a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3).

(premeditated murder).[13] Before a jury properly returns a guilty verdict as to this charge, the jury must find that the defendant possessed general knowledge that he was aiding in the commission of the crime committed by the principal. State v. Cronin, 142 Wn.2d 568, 580-82, 14 P.3d 752 (2000).[14] Thus, in order to convict Soto-Rodriguez as an accomplice to premeditated murder, the State had to prove beyond a reasonable doubt that he had general knowledge that he was aiding in the commission of the crime of murder. Cronin, 142 Wn.2d at 581-82 (State had to prove beyond reasonable doubt that Cronin, who was charged with premeditated first degree murder, had knowledge he was aiding in commission of crime of murder); State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984).

Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found all of the elements required to convict Soto-Rodriguez proved beyond a reasonable doubt. First, there was testimony that Soto-Rodriguez and his companions went to the club with the intention of harming rival gang members. Second, there was testimony that Soto-Rodriguez procured the gun in order to facilitate harm to these rival gang

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[13] RCW 9A.32.030(1), defining first degree murder, provides that "[a] person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person."

Premeditation requires "the deliberate formation of and reflection upon the intent to take a human life," and must involve the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." Hoffman, 116 Wn.2d at 82-83.

[14] A defendant has "knowledge" if "he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010. An accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

members. Third, there was testimony that Soto-Rodriguez developed a plan concerning who would use the gun and how the group would approach the rival gang. Fourth, there was testimony that the shooter wore a glove on his shooting hand to conceal his fingerprints.

Based on this evidence, the jury could have found that Soto-Rodriguez acted with knowledge that his actions would promote or facilitate the commission of premeditated murder. There was evidence that, if believed, demonstrated that Soto-Rodriguez encouraged or requested Perez-Mejia to commit murder, or that he aided or agreed to aid Perez-Mejia in planning or committing it. Further, there was evidence that Perez-Mejia, with a premeditated intent to cause the death of another person, caused the death of a third person. The firearm enhancement allegation was, likewise, supported by ample evidence.

We conclude that the evidence presented was legally sufficient to support the jury's verdict.

III. 3.5 hearing

Before trial, Soto-Rodriguez moved pursuant to CrR 3.5 to suppress evidence of his statement to law enforcement officials, claiming that it was made involuntarily as police obtained it by utilizing ruses and threats, thereby violating both his right to receive due process of law and his privilege against self-incrimination. Soto-Rodriguez contends that the trial court erred in admitting his statement to the police officers. We disagree.

A. Facts

The record indicates that Detective Gies and Deputy Vowell used ruses to obtain Soto-Rodriguez's statement. Detective Gies untruthfully told Soto-Rodriguez that: (1) witnesses saw him at the crime scene; (2) witnesses saw him throw a bottle and police recovered pieces of a bottle with his fingerprints on them; and (3) the police knew that Soto-Rodriguez was not telling them the truth, based on statements police had obtained from other witnesses.

Detective Gies told Soto-Rodriguez that it would be "wise" for him to tell the truth, as he could "get into serious trouble" for lying about a murder investigation, and that he could "help himself out" if he told the truth.

Deputy Vowell and Detective Gies also told Soto-Rodriguez that in jail he might be endangered by rival gangs or by his associates in the MS, and that if he were "to wind up in the wrong cell at the wrong time" there "could be consequences."

B. Analysis

While we find that substantial evidence supports the trial court's findings of fact and conclusions of law on this question, we agree with the trial court's assessment that the officers' comments, particularly the statements implying that Soto-Rodriguez might be harmed if he were placed in "the wrong cell at the wrong time" were "close to the line" and precariously approached the limit of constitutionally permissible interrogation.

A statement obtained by compulsion or trickery deprives a defendant of due process of law. See, e.g., Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966). Accordingly, waivers of Fifth and Sixth Amendment rights must be made voluntarily, knowingly, and intelligently. Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378, (1981) (Fifth Amendment); Patterson v. Illinois, 487 U.S. 285, 292, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988) (Sixth Amendment). Police trickery or misconduct in obtaining a statement from a suspect may render the statement involuntary. Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). However, use of lies or ruses by police officers as investigative tools to obtain statements from suspects will not necessarily render a statement involuntary. See, e.g., State v. Braun, 82 Wn.2d 157, 161, 509 P.2d 742 (1973) (police lied to defendant to obtain confession); State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999) (police lied to defendant to obtain statement and to induce him to lead them to victim's body).

A trial court's determination of the voluntariness of a statement to police will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found, by a preponderance of the evidence, that the statement was voluntary. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). The voluntariness of a statement is determined by examining the totality of the circumstances in which the statement was made. State v. Cushing, 68

Wn. App. 388, 392, 842 P.2d 1035 (1993).

The trial court entered detailed findings of fact and conclusions of law in determining that Soto-Rodriguez's admissions to police were voluntarily made. Specifically, the trial court found that his statement was made voluntarily after a full advisement and waiver of rights, that the ruses utilized by the officers were not "the kind of deceit" that would justify "a finding of a violation of the constitutional rights of the defendant," that Soto-Rodriguez's "will was not overborne by threats," that Soto-Rodriguez was not directly or indirectly threatened with being placed in a jail cell with rival gang members, and that the officers' conduct was "within the appropriate bounds of interrogation." Pursuant to these findings, the trial court allowed the State to admit Soto-Rodriguez's statements to police during his trial.

We find substantial evidence in the record in support of the trial court's findings of fact and that these findings adequately support the trial court's conclusions of law. There was no error.

IV. Trial Irregularities

Soto-Rodriguez assigns error to several other trial court rulings, some of which raise significant concerns. However, none of these alleged irregularities, either taken alone or in combination, merit additional appellate relief. We address these alleged irregularities, although we have no reason to anticipate similar difficulties upon remand.

A. Police officers' opinions on veracity and culpability

Several prosecution witnesses commented on the veracity and culpability of the defendant and other witnesses.

Generally, no witness may offer opinion testimony as to the guilt or veracity of a defendant, whether by direct statement or inference. Because it invades the exclusive province of the jury, such testimony is unfairly prejudicial to the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Admitting opinion testimony regarding the defendant's guilt violates the defendant's constitutional right to an independent determination of the facts by the jury. Demery, 144 Wn.2d at 759; State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993). Similarly, a witness may not express a view or opinion on the credibility of another witness' testimony. Demery, 144 Wn.2d at 764-65; State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991).

At trial, Detective Gies testified that he used ruses in interrogating Soto-Rodriguez because he did not believe that Soto-Rodriguez "was telling the truth." The trial court properly sustained objections to this testimony, ordered it to be stricken, and instructed the jury to disregard the comment.

At trial, Officer Bowns testified that the police cooperated with Aguilar-Segovia and Andrade-Soriano in the investigation because Soto-Rodriguez,

Dominguez, and Perez-Mejia were the three most “culpable.” The trial court properly sustained Soto-Rodriguez's objection to this testimony and ordered it to be stricken.

Officer Bowns also testified that (1) he interviewed Andrade-Soriano three times; (2) he felt that Andrade-Soriano was not being truthful in the first interview; (3) after the second interview, he felt the facts "weren't exactly right"; and (4) after the third interview, he believed he "had the truth of the story."[15] The trial court properly sustained an objection to this testimony and ordered it to be stricken.

We find the trial court appropriately addressed these improprieties, and that the stricken testimony from Detective Gies and Officer Bowns does not furnish a basis for appellate relief. We do not foresee these difficulties arising on remand.

B. Prosecutorial misconduct during cross-examination of Defendant

During cross-examination of the defendant, the prosecutor and Soto-Rodriguez entered into a verbal affray. The prosecutor implied that he was privy to information, not introduced into evidence, establishing Soto-Rodriguez’s

[15] Andrade-Soriano’s three statements to the police differ from one another and from his testimony at trial. In the first statement, Andrade-Soriano stated that he telephoned Soto-Rodriguez from the club. In the two subsequent statements and at trial, he stated that he telephoned Dominguez, not Soto-Rodriguez. In the first and second statements he said that the MS members were coming to the club to introduce a new member named “Micro” (Perez-Mejia). In his third statement and at trial, he reported that the purpose of the visit was to confront rival gang members. In his first statement, he said that he left the club before Soto-Rodriguez arrived and waited in his car. In subsequent statements, he stated that he went to Soto-Rodriguez’s house and then rode back to the club with his fellow MS members.

ownership of a particular gun. The ownership of this firearm was a disputed matter at trial.

Soto-Rodriguez testified that Perez-Mejia had placed a gun under the hood of Soto-Rodriguez's car before the group drove to the club on the night of the shooting. When Soto-Rodriguez was subsequently stopped by police officers while driving the car, the officers found the gun. At trial, the prosecutor questioned Soto-Rodriguez about the gun, saying, "You weren't concerned about the gun . . . because it was your gun."

Soto-Rodriguez's counsel objected, stating that the question lacked foundation and was argumentative. The trial court overruled the objection.

The prosecutor then said, "I see it looks like you're laughing."

Soto-Rodriguez responded, "You can't prove that it's mine. How could you prove that?"

The prosecutor replied, "I don't think I had better answer that question."

Soto-Rodriguez's counsel stated, "Objection, Your Honor. Move to strike." The trial court sustained the objection, stating: "Strike the comment."

On appeal, Soto-Rodriguez argues that the prosecutor committed misconduct by implying to the jury that Soto-Rodriguez owned the pistol found under the hood of his car, in the absence of evidence of this fact being properly introduced into the trial. A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.

Russell, 125 Wn.2d at 87 (citing Garza, 608 F.2d at 663).

A defendant alleging prosecutorial misconduct has the burden of showing the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). To determine the prejudicial impact of the misconduct, we consider the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given the jury. Brown, 132 Wn.2d at 561.

We find that any prejudice stemming from the prosecutor's improper remark was cured by the court's ruling striking the comment, and by its general instruction to the jury that the comments and questions of counsel are not evidence. The trial court was in the best position to observe the exchange between Soto-Rodriguez and the prosecutor. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Further, it was undisputed that the particular weapon discussed was not the murder weapon.

We do not assume that this situation will arise on remand.

C. Challenges to Soto-Rodriguez to explain inconsistent testimony

Soto-Rodriguez's testimony at trial concerning his statement to police conflicted with Detective Gies' testimony concerning the statement.

On cross-examination, the prosecutor asked Soto-Rodriguez several times whether the detective's version of events "never happened." Soto-Rodriguez did not object to this line of questioning.

A prosecutor engages in misconduct by asking a witness to comment on the veracity of another witness's testimony. Neidigh, 78 Wn. App. at 75-77; State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). However, when the defendant has failed to object to the impropriety at trial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. Neidigh, 78 Wn. App. at 77.

Because Soto-Rodriguez neither objected to this line of questioning nor requested a curative instruction, and because we conclude that the questions were neither flagrant nor ill-intentioned, we conclude that this irregularity does not warrant relief on appeal.

We do not foresee this difficulty arising on remand.

D. Evidentiary rulings

Before trial, Soto-Rodriguez moved to exclude all evidence regarding gangs and gang membership. The trial court found that gang evidence was inextricably tied to the facts of the case, that the "pool cue incident" of April 27, 2003, provided the motivation for Soto-Rodriguez and his associates to go to the club on the evening of the shooting, and that Soto-Rodriguez's gang membership was relevant to his role, if any, in the crime.[16]

[16] The trial court also allowed the State to use gang nicknames to identify various individuals involved in the incident, including Soto-Rodriguez, based on its determination that the nicknames were relevant "given the nature of the evidence to be presented," that certain witnesses knew the gang members only by their nicknames, and that the probative value of the evidence outweighed the risk of unfair prejudice to Soto-Rodriguez.

The trial court precluded general references or expert testimony concerning gang activity, and stated that if witnesses were questioned regarding gang practices, the court would rule on objections at the time of such questioning.

On appeal, Soto-Rodriguez claims that unduly prejudicial evidence of gang activity was improperly admitted at trial. Although Soto-Rodriguez's appellate counsel argues that much of the evidence should have been excluded pursuant to ER 404(b), this argument appears to improperly categorize the evidence at issue, the vast majority of which is properly analyzed pursuant to ER 403.

During argument on the pre-trial motions, the trial court properly noted that, "the only arguably 404(b) evidence we're talking about here is the April 27 pool cue incident." In ruling on this evidence, the trial court explained its ruling as follows:

> I'm going to deny the motion to exclude reference to the April 27th incident. It is relevant as background to establish why co-defendants allegedly came to the club given the potential testimony or the proof of testimony. I will allow it and deny that motion.

The trial court's ruling is reviewed for an abuse of discretion. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

The evidence at issue was relevant to explain the motive for the shooting, and was, at most, minimally prejudicial to Soto-Rodriguez, as there was no

indication that he was in any was involved with the incident in question. The trial court properly exercised its discretion in ruling on this question.

Evidence of gang affiliation is admissible upon a showing of a nexus between the gang activities and charged crimes. State v. Campbell, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). Further, "[a] trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect under ER 403 will be overturned only for manifest abuse of discretion." Russell, 125 Wn.2d at 78. Where Soto-Rodriguez failed to object at trial, he waived any challenge on appeal. RAP 2.5(a).

Given the circumstances of the case, the trial court's decision to admit limited evidence concerning gang activity was a reasonable exercise of its discretion, as there was a sufficient nexus between the gang evidence and the charged crime, and the probative nature of the evidence admitted by the trial court outweighed any unfair prejudice to Soto-Rodriguez. The evidence at issue in the instant appeal explained the motive for the shooting, and was relevant on the issues of premeditation and intent. Most of the evidence relating to gang affiliation was admitted at trial without objection,[17] and the trial court properly

[17] At trial, Soto-Rodriguez interposed no objection when: (1) Deputy Vowell identified the MS and VL as street gangs and testified that there were tensions between these gangs; (2) Seattle Police Officer Bowns identified the MS as a gang from El Salvador and said that it was difficult to obtain cooperation from witnesses in gang cases; (3) DeJesus testified at length about the confrontation in front of the club, about his own initiation into his gang, and about his gang tattoos; (4) Viellmas testified that he used to belong to the VL, that one can never get out of a gang, and testified as to his perspective that the fight started when the MS members challenged him by insulting the VL; (5) Andrade-Soriano testified that he, Dominguez and Soto-Rodriguez were MS gang members, that he was beaten up as a gang initiation, that Soto-Rodriguez was one of the people who initiated him into the gang, and that one could never get out of a gang.

ruled on specific objections.[18]

There was no error.

V. Other assignments of error

Soto-Rodriguez claims that the prosecutor improperly questioned him regarding whether or not he was an MS gang member and that the trial court erred by allowing the State to impeach Soto-Rodriguez with photographs demonstrating his connection to the MS gang.

The scope of cross-examination is within the sound discretion of the trial court. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). We review a trial court's balancing of probative value against prejudicial effect under ER 403 for manifest abuse of discretion. Russell, 125 Wn. 2d at 78.

The trial court did not abuse its discretion in allowing the prosecutor to question Soto-Rodriguez about his gang involvement. Soto-Rodriguez testified that he had never willingly been a member of MS, a claim that bore directly on his credibility as a witness. In addition, the motivation for the shooting was gang-related. Given this context, Soto-Rodriguez's denial of gang connections was a proper area for exploration during cross-examination.

The testimony that Soto-Rodriguez beat Andrade-Soriano was elicited by Soto-Rodriguez's trial counsel.

[18] At trial, Soto-Rodriguez objected when DeJesus testified that one could never willingly leave a gang. The trial court ruled that DeJesus could testify to his own perspective regarding whether he could ever leave the gang.

Soto-Rodriguez also objected when DeJesus testified about his previous fights with other gangs. The trial court instructed the jury that the testimony about DeJesus' previous gang fights "relates to this witness's personal experiences [and] is not designed to be general testimony about all gangs or all gang activity."

The trial court also did not abuse its discretion in subsequently allowing the prosecutor to impeach Soto-Rodriguez with photographs demonstrating his connection to the MS gang. The trial court found that the State had been surprised by Soto-Rodriguez's testimony denying his gang membership, and that a detective brought the photographs to the prosecutor's attention only after the surprising testimony. The court noted that Soto-Rodriguez knew of and controlled the photographs prior to his arrest.

The trial court found that, under these circumstances, Soto-Rodriguez had not established a discovery violation on the part of the State. The court noted that the prosecution disclosed the evidence to Soto-Rodriguez's counsel as soon as the prosecution determined the need to use the photographs. Additionally, the court granted the defense a continuance so that Soto-Rodriguez and his counsel could discuss the evidence and pursue other evidentiary strategies.

A trial judge has wide latitude in ruling on alleged discovery violations. State v. Dunivin, 65 Wn. App. 728, 731, 829 P.2d 799 (1992). Absent a showing of abuse of discretion, we will not disturb the ruling on appeal. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Given the circumstances, we conclude that the trial court's rulings were a proper exercise of its discretion.

Further, granting a continuance rather than a mistrial for a discovery violation concerning impeachment evidence used during cross-examination is

within a trial court's discretion. State v. Linden, 89 Wn. App. 184, 195, 947 P.2d 1284 (1997). Here, the trial court granted such a continuance even in the absence of a discovery violation. There was no error.

Obviously, the element of surprise concerning the photographs will not be an issue on remand.[19]

Reversed and remanded for a new trial.

Dwyer, J.

We concur:

Appelwick, C.J.

Baker, J.

[19] Given that we reverse the conviction on other grounds, Soto-Rodriguez's claim of cumulative error and his assignments of error relating to denied motions for a mistrial are moot.

Finally, in his pro se Statement of Additional Grounds for Review, Soto-Rodriguez asserts that he was denied his right to a speedy trial. This argument is without merit.